Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-968

POPULAR SCIENCE PUBLISHING COMPANY, INC.,

Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four].

JURISDICTIONAL STATEMENT.

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BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District [Division Four].

JURISDICTIONAL STATEMENT.

This is an appeal brought by Popular Science Publishing Company, Inc. from the decision of the Court of Appeal of the State of California upholding the imposition by the Board of Equalization of the State of California of use tax collection liability on Appellant's mail order sales to California residents. Appellant's petition for a hearing was denied by the California Supreme Court. The Court of Appeal held that *National Geographic v. State Board of Equalization,* 16 Cal. 3d 643, 128 Cal. Rptr. 682 (1976), which is currently on appeal to the Supreme Court of the United States, was dispositive of the issues in this case. This Court has noted probable jurisdiction of the appeal from

the decision of the California Supreme Court in *National Geographic*, 45 U.S.L.W. 3280 (1976).

The Supreme Court of California in that case adopted a test of use tax liability based on the "slightest presence within such taxing state" regardless of the nature of such presence. This test, which was applied by the Court of Appeal in the instant case, is directly contrary to the holdings of this court in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) and *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

Inasmuch as this case presents substantially similar issues to *National Geographic* within the context of facts far less favorable to the Appellee Board, substantial justice requires that the opinion of the Court of Appeal of California, Second Appellate District, be set aside, and the order of the Superior Court of Los Angeles County holding in favor of Appellant on December 30, 1974, be reinstated.

Opinions Below.

The unreported opinion of the Court of Appeal of the State of California, Second Appellate District (Division Four) is set forth in Appendix A hereto. The order of the Supreme Court of California denying Appellant's petition for a hearing is reprinted in Appendix B.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). This appeal tests the validity of compelling the Popular Science Publishing Company, Inc.[1] (hereinafter "Appellant") to pay state use tax

[1]The Company's name was changed to Times Mirror Magazines, Inc. subsequent to the filing of this action.

under California Revenue and Taxation Code §§6006 (g), 6201-6204 (printed in Appendix C) on its mail order sales to California residents effected entirely through interstate commerce and having no contact with the taxing state except through the instrumentalities of interstate commerce. The imposition of such use tax liability contravenes the Commerce Clause (Article I, Section 8(3)) and the Due Process Clause of the Constitution of the United States.

The instant case originated in 1970, when the Board of Equalization of the State of California (hereinafter "Board") mailed to Appellant a Notice of Determination of Liability under the California Revenue and Taxation Code for sales and use tax, interest and penalties allegedly due on mail order sales of books by Appellant during 1965 to its book club members in California. On October 18, 1971, Appellant paid under protest the assessed amount of $25,875.28 and subsequently filed its claim for refund with the Board on November 5, 1971. Appellant's claim for refund was deemed denied by the operation of California Revenue and Taxation Code §6934[2] when more than six months elapsed after the filing of the claim without the mailing of notice of action thereon to the Appellant.

On May 24, 1972, Appellant filed this action in Los Angeles County Superior Court, seeking a refund

[2]Section 6934 of the Revenue and Taxation Code reads as follows:

"6934. *Right of action on failure of board to mail notice.* If the board fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice by the board of its action on the claim, consider the claim disallowed and bring an action against the board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

on grounds that the imposition of use tax liability was a violation of the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States. After a non-jury trial upon a statement of stipulated facts, the Superior Court entered judgment in favor of Appellant and ordered the Board to refund $31,053.60, a sum which included interest and court costs.

On appeal, the Court of Appeal, Second Appellate District (Division Four) reversed on August 16, 1976, relying on *National Geographic v. State Board of Equalization, supra.* The Supreme Court of California denied a hearing on October 14, 1976. Timely notice of appeal to this Court was filed in the Court of Appeal on January 10, 1977. The notice of appeal is set forth as Appendix D.

As the Court of Appeal rejected the foregoing constitutional challenges to imposition of use tax liability under California Revenue and Taxation Code §6006(g) and Appellant's petition for hearing was denied by the Supreme Court of California, this case is appropriately brought before this Court by appeal. See, *e.g., Douglas v. California,* 372 U.S. 353, 354 (1963).

If, despite its action in *National Geographic,* this Court does not consider appeal the proper mode of review, the Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§1257(3) and 2103.

Questions Presented.

Whether the imposition of use tax collection liability upon an out-of-state mail order seller violates the Due Process Clause of the Fourteenth Amendment and the Commerce Clause where the seller's activities within the taxing state are insubstantial and utterly unrelated to the sales in interstate commerce sought to be taxed.

(a) Whether the presence within the taxing state of two salesmen, whose activities on behalf of a separate division of the out-of-state seller were entirely unrelated to the transactions sought to be taxed, provides the nexus required to impose use tax liability on the seller for such unrelated transactions conducted exclusively through the instrumentalities of interstate commerce.

(b) Whether the "slightest presence" test formulated by the California Supreme Court is constitutional as applied by the Court of Appeal of California in light of *Miller Bros. v. Maryland,* 347 U.S. 340 (1954) and other holdings of this Court consistent with the rationale of that decision.

Statement.

The Appellant seeks review of a holding of the Court of Appeal of California in favor of the Board in an action brought by Appellant to recover alleged use tax collection liabilities paid by Appellant to the Board under protest and for a declaration of nonliability for such use tax during the year in question.

Statement of Facts.

Appellant, Popular Science Publishing Company, Inc., was in 1965 and still is, a New York corporation maintaining its principal place of business in New York. During 1965[3] Appellant was principally engaged in publishing the monthly magazines "Popular Science" and "Outdoor Life." Appellant also sponsored the Popular Science Book Club and the Outdoor Life Book Club which periodically offered members a choice of books dealing generally with subjects similar to those treated in the two magazines (Stipulation of Facts ¶3, CT 17).[4]

In addition, during 1965 Appellant's A-V Division ("A-V") produced and sold instructional filmstrips and other audio-visual educational aids which dealt with subjects appropriate to secondary school curricula ("instructional materials"). These instructional materials were marketed exclusively through A-V. On January 1, 1966, A-V became a separate corporation (Stipulation of Facts ¶4, CT 17). During 1965 A-V employed two salesmen in California whose duties and activities were strictly confined to soliciting orders for A-V instructional materials. These instructional materials were sold primarily to secondary schools on the basis of orders received at Appellant's New York office and filled from inventories located outside of California.

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[3]The only year in dispute in this case is the tax year 1965. Unless otherwise indicated expressly, all references shall be to events and circumstances during that taxable year.

[4]The stipulation of facts is attached as Appendix E and is contained in the Clerk's Transcript on Appeal to be lodged with this Court. References to "CT" indicate the page number of the Clerk's Transcript where the referenced matter may be found.

A-V's customers had no relationship of any kind with either of Appellant's book clubs, although some may have been subscribers to either or both of Appellant's magazines. Such a connection, if it existed at all, would have been purely coincidental and had nothing to do with the activities of the A-V salesmen or the sales of instructional materials. The A-V salesmen did not promote or make any customer contacts on behalf of the magazines or either book club, were in no way involved in processing orders of, or collecting monies from, the magazine subscribers or book club members and had no operational connection of any kind in any way related to Appellant's magazines or book clubs. Their activity related exclusively to the sale of A-V instructional materials (Stipulation of Facts ¶5, CT 18).

Subscriptions to Appellant's magazines were generated through the subscriber's own initiative or as a result of mail or media advertising emanating from Appellant's New York office. All magazine subscription orders were received through the mail, accepted by Appellant in New York and filled by mail from Appellant's printers located outside of the State of California. Newsstand sales of the magazines were made by independent retail vendors supplied by a New York distributor which purchased the magazines from Appellant at wholesale (Stipulation of Facts ¶¶6-7, CT 18, 19).

Book club memberships were solicited by Appellant "exclusively through the mail from New York, and book sales were made on the basis of orders sent by mail to [Appellant] in New York in response to periodic mailings of brochures to members describing the current selections available." (Stipulation of Facts

¶6, CT 18). Book club orders were received through the mail, accepted by Appellant at its New York office, and filled by mailing the book club selection to the member from locations outside of the State of California (Stipulation of Facts ¶¶6-7, CT 18, 19).

As noted above, the Board assessed use taxes against Appellant under Revenue and Taxation Code Section 6006(g) on Appellant's mail order sales of books during 1965 to book clubs members using California addresses. On October 18, 1971, Appellant paid under protest $25,875.28, the total amount required by the determination of the Board.

How the Federal Questions Were Raised and Decided Below.

Appellant's Claim for Refund filed on November 5, 1971, was based on grounds that the imposition of use tax liability on Appellant violated the Due Process Clause of the Fourteenth Amendment, and by implication, the Commerce Clause of the United States Constitution. The Claim for Refund was deemed denied by operation of law, as referred to above, and on May 24, 1972, Appellant filed this action in Los Angeles County Superior Court.

In its suit in the Superior Court of California, the Appellant argued that: (1) the imposition of use tax on its mail order business violated due process of law since there was no meaningful relationship between Appellant's activities in California and the out-of-state mail order sales sought to be taxed and (2) the Board's decision to impose a use tax on Appellant's mail order book sales similarly violated the Commerce Clause.

The Superior Court entered judgment for Appellant, and in its minute order dated December 30, 1974, held the opinion in *Montgomery Ward & Co. v. State Board of Equalization,* 272 Cal. App. 2d 728 (1969), cert. den. 396 U.S. 1040 (1970), to be dispositive of the case (CT 66).

Finding that the Board's position was even stronger in *Montgomery Ward,* where the California Court of Appeal struck down the imposition of use tax on certain out-of-state sales by Montgomery Ward despite the retailer's substantial presence in California, the court quoted from that decision as follows:

> " 'the corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "disassociated from the local business" and therefore may not, consistent with due process, be taxed.' " (272 Cal. App. 2d at 755).
>
> " 'So here the fact that the retailer elected to carry on an intrastate business in California is purely fortuitous and does not give this state the right to reach out and tax or otherwise burden transactions which are entirely disassociated from local business.' " (272 Cal. App. 2d at 755).

Based on the Stipulation of Facts, the Court concluded that sales by Appellant's A-V Division were "entirely disassociated" from the book sales and ordered judgment for Appellant (CT 66).

On appeal by the Board to the Court of Appeal, that Court held that Appellant's constitutional challenges were foreclosed by the California Supreme Court's decision in *National Geographic Society v. State*

Board of Equalization, 16 Cal. 3d 637 (1976), despite the fact that the record showed no connection between the instate activities of the A-V salesmen and Appellant's mail order sales. The court noted that *Montgomery Ward* and *National Bellas Hess v. Department of Revenue,* 386 U.S. 753 (1967) were distinguished in *National Geographic* (Appendix A at 3-4a). In its decision, the Court particularly relied on the following passage from the *National Geographic* decision at 16 Cal. 3d 645:

> " 'Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the instate activities of such seller are "dissociated" from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale and holding of *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359.' "

Following the decision by the Court of Appeal, the Supreme Court of California denied Appellant's petition for a hearing in an order filed October 14, 1976. This appeal ensued.

The Questions Are Substantial.

As applied by the California Court of Appeal, the construction of the Revenue and Taxation Code by the Supreme Court of California allows the State of California to impose use tax collection liability on an out-of-state mail-order retailer's sales where the retailer's instate activities are minuscule and totally unrelated to the transactions sought to be taxed. This holding by the Court of Appeal extends the *National Geographic* decision by upholding the imposition of a use tax on out-of-state sales where there was *neither* substantial instate activity nor any connection between minimal instate activity and the activity being taxed. In so holding, the Court of Appeal's decision exceeds the limits drawn by this Court within which a state may constitutionally impose liability on out-of-state retailers for use tax on mail order sales. Thus, the Court of Appeal's dilution of the "nexus" requirement set forth by this Court ("some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax", *Miller Bros. Co. v. Maryland,* 347 U.S. 340, 345) raises important questions about the limitations on a state's power to tax under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution.

The Imposition of Use Tax Collection Liability on a Foreign Corporation Is Constitutionally Impermissible Where There Is No Connection Between the Activities of Said Corporation Within the State and Its Interstate Mail Order Activities Sought to Be Taxed.

In *National Bellas Hess v. Dept. of Revenue,* 386 U.S. 753 (1967), this Court summarized the twin tests for imposition of use tax liability under the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. I, §8, Cl. 3) of the United States Constitution as follows:

> "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. (citation omitted). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' (citations omitted). And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the State has given anything for which it can ask return.' *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (additional citations omitted). The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. v. Maryland,* 347 U.S. 340, 344-345, 74 S. Ct. 535, 539, 98 L. Ed. 744 (additional citations omitted)."

In every case in which this Court has upheld a state's power to impose liability on an out-of-state retailer for use tax on sales made to customers within the state, there has been a "definite link" (*Miller Bros. Co., supra*) between the instate activities of the retailer and the interstate transactions which were the target of the tax. Without that link, this Court has held that the state lacks the nexus necessary for the exercise of its taxing power. Such a nexus has been found to warrant imposition of use tax collection liability on an out-of-state seller where the seller's intrastate activities were inextricably intertwined with the transactions on which the tax was imposed. Thus in *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960), the presence of instate traveling salesmen soliciting orders for the products on which the obligation to collect use tax was claimed to have arisen was held to provide sufficient nexus.

This common factual pattern also unites *Felt & Tarrant Co. v. Gallagher,* 306 U.S. 62 (1939) (the retailer had two general agents in the taxing state, in offices for which the corporation paid the rent, soliciting orders for the items sought to be taxed); *McGoldrick v. Berwind-White Co.,* 309 U.S. 33 (1940) (the corporation maintained its sales office and sold and delivered the merchandise for which orders were solicited within the jurisdiction of the taxing authority); and *The Reader's Digest Association, Inc. v. Mahin,*

44 Ill. 2d 354 (1970), cert. den., 399 U.S. 919 (1970) (Reader's Digest advertised extensively in Illinois, placing advertisements for the products sought to be taxed in local newspapers and on local television and radio stations. In addition, advertising for the magazine was solicited by an Illinois subsidiary, which had made door-to-door sales of the very items the sales of which were sought to be taxed).

Similarly, in *Standard Steel Co. v. Wash. Revenue Dept.*, 419 U.S. 560 (1974)—a case which involved a business and occupation tax—the state was found to have established a taxable nexus where the out-of-state seller retained in the state a full-time engineer who advised the seller's purchaser of its needs for the very products ordered by mail and shipped in interstate commerce.

While this Court has rejected constitutional challenges based solely on claims that a seller's instate activities were technically divorced from its mail order business (see *e.g., Nelson v. Sears, Roebuck and Co.*, 312 U.S. 359 (1941)), such cases are clearly distinguishable from the case at bar.

In *Nelson v. Sears, Roebuck and Co.*, for example, the seller engaged in substantial related intrastate retail sales activities. The instate activities which supplied the nexus for the use tax were virtually identical to the interstate activities which Iowa sought to tax. Sears sold the same products to its mail order customers as it sold to Iowa customers at its Iowa retail outlets. Furthermore, the finding of a sufficient nexus rested in part on the fact that Sears was qualified to do business within the taxing state.[5]

[5]Even in *National Geographic Society, supra,* currently on appeal to this Court, the Supreme Court of California premised its holding on the similarity between the Society's instate activities and its mail order sales:

> "We observe no basic dissimilarity between the Magazine on the one hand and the maps, atlases, globes and books on the other. Both the Magazine and the latter mail order merchandise are ordered, paid for and delivered in essentially the same way. The Magazine and the merchandise are remarkably similar in nature, function and purpose. We can discern no significant difference between a periodical which deals with geography and maps, atlases, globes and books which obviously cover the same field of knowledge. Nor can we detect any fundamental difference in function—both the Magazine and the merchandise make information gathered by the Society available to its members." 16 Cal. 3d at 647.

The facts of this case are in sharp contrast to the decisions of this Court upholding use tax liability. As stipulated by the parties, there was no relationship between Appellant's mail order sales of books and the activities of the A-V salesmen within the state. Furthermore, Appellant was not qualified to do business in California and there is nothing in the record to support a claim that it was required to be so qualified.

A. The Presence Within the Taxing State of Two Salesmen Whose Activities Were Entirely Unrelated to the Mail Order Transactions Sought to Be Taxed Does Not Provide a Sufficient Nexus to Impose Use Tax Liability.

The central issue here is whether the presence in the State of California in 1965 of two isolated salesmen can constitutionally provide the necessary nexus within the state to make Appellant liable for a tax on unrelated mail order transactions conducted entirely through the instrumentalities of interstate commerce.

The Court of Appeal concluded, on the basis of two salesmen employed by Appellant's A-V Division who solicited sales of unrelated audio-visual products within California, that Appellant was liable for collec-

tion of use taxes on its mail order book sales[6] (Appendix A, 3a).

It is submitted, however, that the mere fact that Appellant had two salesmen within the state did not give California the constitutionally required nexus for imposition of use tax liability. There must be "some definite link" between the instate activities of these salesmen and Appellant's sales from without the state to California addresses to provide a nexus.[7] Moreover, this Court has stated that, with respect to a sales-related tax, an out-of-state vendor may be exempted from tax by a clear showing that there are no instate activities connected with the out-of-state sales. *American Oil v. Neill,* 380 U.S. 451, 458 (1965).

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[6]To the extent that the Court of Appeal's decision rested on a characterization of Appellant's two A-V salesmen as "an office," it is erroneous. The record does not show that A-V maintained an office within California.

[7]The scholarly opinion in *Montgomery Ward & Co., Inc. v. State Board of Equalization,* 272 Cal. App. 2d 723, 78 Cal. Rptr. 373 (1969), cert. den. 396 U.S. 1040 (1970) clarifies the qualitative test of whether there is a nexus sufficient for imposition of use tax liability. In that case, the Court struck down the imposition of California use tax on certain out-of-state sales by Montgomery Ward to California residents, even though Montgomery Ward's regional headquarters were located in California and the retailer maintained 21 retail stores within the state. The Court stated that:

> "California may burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. The protection afforded and the benefits conferred must have some relationship to the transaction which the state seeks to burden." *Montgomery Ward, supra,* at 382.

As the Court pointed out, even Montgomery Ward's substantial instate presence was not enough absent that crucial connection:

> "The existence of regional headquarters in Oakland, with administrative jurisdiction over the border stores, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here." 78 Cal. Rptr. 373, 385.

Here, as stipulated by the Board, it is clear that Appellant had no activities in California connected with the mail order sales which the state seeks to tax.

Unlike the retailer in *Sears, Roebuck & Co., supra,* the Appellant was not registered to do business in California as a foreign corporation and was not required to do so. Furthermore, Appellant had no warehouse, no retail stores, no tangible property, no offices, no real property, and no other constitutionally meaningful connection with the state of California during the period in question. The record shows no intrastate advertising in local newspapers, no radio or television spot advertisements aimed at potential California mail order customers, and no indirect sales or solicitation activities in California to promote the mail order sales of either the magazines or the book clubs by the A-V salesmen or through subsidiary organizations, departments, agents or independent contractors.

In short, none of the contacts which this Court has required to justify the imposition of use tax liability may be found here.

Appellant has willingly paid all the taxes due on its instate activities. It has no quarrel with a doctrine which holds that a retailer who engages in substantial instate activities promoting the very products he sells via interstate commerce should not be able to evade tax on those sales through intracorporate structural manipulations.

But that is not the case here. Measured against this Court's test of "whether the State has given anything for which it can ask return" (*Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444) it is apparent that

Appellant's interstate activities did not enjoy any opportunities, benefits and protection for which the state can in return impose such a burden on its sales in interstate commerce.

This Court has already noted probable jurisdiction of a similar challenge to California's extension of use tax collection liability in *National Geographic v. State Board of Equalization*, 45 U.S.L.W. 3280 (October 12, 1976).

It is respectfully submitted that the Court of Appeal decision based on the foregoing facts places an even more unreasonable and unconscionable burden on retail sales made in interstate commerce. As noted above, the contacts which Appellant had with the State were even more tenuous than those present in *National Geographic*.

B. The "Slightest Presence" Test Formulated by the California Supreme Court Is Unconstitutional as Applied by the Court of Appeal of California.

This Court has specifically rejected the imposition of use tax liability based solely on an out-of-state seller's presence within the taxing state without regard to the nature and quality of that presence. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). See also *Montgomery Ward, supra*, and the cases cited above.

In *Miller Bros. Co.*, the sales sought to be taxed by Maryland were made to Maryland residents who purchased goods at the Miller Bros.' Delaware store. The retailer's advertising in Delaware media was known to reach Maryland residents and circulars were mailed to Maryland customers. Furthermore, some of the purchases were delivered to customers in Maryland by

a Miller Bros. delivery truck. Nevertheless, this Court found the retailer to have an insufficient connection with Maryland to uphold the imposition of use tax liability.

The "slightest presence" test of the Supreme Court of California as followed by the Court of Appeal, eliminates the requirement for such a careful examination of an out-of-state retailer's instate activities. Instead, it substitutes a de facto rule whereby any contact with the state, however inconsequential, would be sufficient to support imposition of the state's taxing power.

This California rule would permit a state to tax an out-of-state company's sales made entirely in interstate commerce based solely on the entry into the state of salesmen attempting to introduce a separate product line even if no sales were consummated as a result of their activity. The perpetuation of such a rule would create unreasonable and stifling burdens on interstate commerce.

Conclusion.

For the reasons set forth herein, Appellant respectfully urges that the Court note probable jurisdiction of the appeal applied for herein. In *National Geographic v. State Board of Equalization*, 45 U.S.L.W. 3280 (1976), this Court has noted probable jurisdiction in a case raising similar legal issues.

The Court may wish to review the issues posed by this case within the context of facts which Appellant contends exceed even the limits on use tax liability set by the Supreme Court of California in *National Geographic, supra*. Appellant respectfuliy submits that this Court has never permitted the imposition of use

tax liability on an out-of-state seller's mail order transactions where, as here, the seller's activities within the taxing state are so insubstantial and utterly unrelated to the sales sought to be taxed. In light of the fact that the Court has noted probable jurisdiction in *National Geographic,* it is urged that it is essential that the Court note probable jurisdiction in this case to avoid substantial injustice to Appellant. Should the Court decline jurisdiction of this appeal, Appellant would be left without recourse even in the event that this Court reversed the decision in *National Geographic.* Clearly, a reversal of *National Geographic* would be dispositive of this case.

It is respectfully submitted that a decision upholding *National Geographic* would not necessarily be dispositive of this case, for the reasons discussed above.

In furtherance of noting probable jurisdiction the Court may wish to join this case with *National Geographic* because of the similarity of issues. Such action would permit this Court to resolve the extent of state taxing power within the context of factual circumstances which provide an even more tenuous claim for the constitutionally required nexus than the contacts present in *National Geographic, supra.*

In the alternative, this Court may wish to hold this case pending a decision on the merits in *National Geographic.*

Appellant respectfully urges this Court to adopt one of the foregoing courses of action.

Respectfully submitted,

JAMES W. WALLACE,
HUGH S. MCMULLEN,
Attorneys for Appellant.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Popular Science Publishing Company, Inc., Plaintiff and Respondent, v. State Board of Equalization of the State of California, Defendant and Appellant. Civ. No. 46535, (Superior Court No. C 30578).

Filed: Aug. 16, 1976.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert A. Wenke, Judge. Reversed with directions.

Evelle J. Younger, Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Appellant.

James W. Wallace and Hugh S. McMullen for Plaintiff and Respondent.

Defendant board appeals from a judgment of the trial court for plaintiff. Plaintiff, Popular Science Publishing Company, Inc.[1] sued defendant board for refund of use tax, plus interest and plus penalty, paid under protest. The case was tried by the trial judge upon a stipulation of facts, upon the depositions of two of respondent's officers and upon a handbook of educational film strips.[2] The facts stipulated to show that, at all times pertinent, plaintiff was a New York corporation; in 1965, the year involved in the use tax payment, plaintiff published "Popular Science" and

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[1]The name, "Popular Science Publishing Company, Inc.", was changed to "Times Mirror Magazines, Inc." after the filing of the action.

[2]The Stipulation of Facts is before us and provides that either party may offer additional evidence.

"Outdoor Life" and sold these magazines throughout the United States by mail and through news vendors; plaintiff also sponsored Popular Science Book Club and Outdoor Life Book Club; and its audio-visual division produced and sold instructional film strips; "A-V" was established in 1965 to market these strips and A-V became a separate corporation January 1, 1966; A-V employed two salesmen who lived in and traveled throughout California for the purpose of selling the audio-visual film strips to educational institutions; the A-V salesmen had no operational connection with plaintiff's magazines or book clubs; subscriptions to "Popular Science" and "Outdoor Life" were obtained as a result of mail or media advertising emanating from plaintiff's New York office; newsstand sales were made by independent retail vendors "supplied by a New York distributor which purchased the magazines from Plaintiff at wholesale"; book club memberships were solicited by mail sent from New York; plaintiff maintained no offices in California through which any aspect "of its magazine publishing or book club business was conducted, and Plaintiff had no employee or independent contractor in California" who promoted sales to California residents of "Popular Science" or "Outdoor Life" or offered memberships in either book club.

The question for us to determine is whether this stipulation of facts shows sufficient basis for sustaining the trial court's judgment. We conclude that it does not, for the reason that the use of a separate division in California to sell film strips does not insulate plaintiff from its duty to collect a sales/use tax in California on its mail order sales to California residents. The effect of the use taxation was to insure competitive parity between foreign and local retailers by requiring

the foreign retailers to collect a use tax which is identical in amount to the tax imposed upon local retailers. (*National Geographic Society v. State Bd. of Equalization,* 16 Cal.3d 637, 641 [1976]; *Montgomery Ward & Co. v. State Bd. of Equalization,* 272 Cal.App.2d 728, 739 [1969].)

Respondent magazine publisher argues that to impose a use tax on mail order sales would be contrary to the due process and commerce clauses of the United States Constitution (14th Amendment and art. I, § 8, clause 3) because no connection was shown between the instate activities of the A-V salesmen and the mail order sales. However, *National Geographic Society v. State Bd. of Equalization, supra,* 16 Cal.3d at pp. 640, 642, involving the use by National Geographic of two offices in California to solicit advertising for its magazine. Here, the office of respondent was disassociated from sales, except audio-visual products; respondent relies upon disassociation. Concerning this, our Supreme Court stated in *National Geographic Society v. State Bd. of Equalization, supra,* 16 Cal.3d at p. 645, the following: "Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the in-state activities of such seller are 'dissociated' from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale

and holding of *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359."

Respondent's and the trial court's reliance upon the cases of *Montgomery Ward & Co., supra,* 272 Cal. App. 2d and *Nat. Bellas Hess v. Dept. of Revenue,* 386 U.S. 753, 18 L.Ed.2d 505 (1967) is misplaced; both cases are distinguishable and are distinguished by our Supreme Court in *National Geographic Society, supra,* 16 Cal.3d.

The judgment is reversed with directions to the trial court to enter judgment for defendant.

NOT FOR PUBLICATION

Dunn, *J.*

We concur:

Kingsley, *Acting P. J.*

Jefferson (Bernard), *J.*

APPENDIX B.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 4, Civil No. 46535,

In the Supreme Court of the State of California in Bank.

Order Due October 15, 1976.

Popular Science Publishing Company, Incorporated v. State Board of Equalization, etc.

Filed: Oct. 14, 1976.

Appellant's petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is denied.

Wright
Chief Justice

APPENDIX C.

Constitutional and Statutory Provisions Involved.

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§6201-04, 6006(g), set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate of 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser

from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Sections 292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from

the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6006(g). Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in for-hire transportation of property in interstate or foreign commerce, such as railroad locomotives, trucks, truck tractors, truck trailers, dollies, bogies, chassis, and cargo shipping containers.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

APPENDIX D.

Notice of Appeal.

In the Court of Appeal of the State of California, Second Appellate District [Division Four].

Popular Science Publishing Company, Inc., Plaintiff and Appellant v. State Board of Equalization of the State of California, Defendant and Appellee. Civil No. 46535.

Filed: Jan. 10, 1977.

TO: THE CLERK OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT [DIVISION FOUR]:

NOTICE IS HEREBY GIVEN that Popular Science Publishing Company, Inc., Plaintiff and Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered on August 16, 1976, a hearing on which was denied by the Supreme Court of the State of California on October 14, 1976.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

Dated: January 10, 1977.

JAMES W. WALLACE
HUGH S. MCMULLEN
/s/ By James W. Wallace
James W. Wallace
Attorneys for
Plaintiff and Appellant

APPENDIX E.

Stipulation of Facts.

Superior Court of the State of California, for the County of Los Angeles.

Popular Science Publishing Company, Inc., plaintiff, vs. State Board of Equalization of the State of California, Defendant. No. C 30578.

FILED: August 27, 1974.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that, for the purpose of trial in the above-entitled cause, the facts hereinafter stated are undisputed and may be treated by the Court as facts proved in open court, and that the parties may, on the trial of said cause, call witnesses and offer evidence for the purpose of proving such additional facts as the parties may see fit;

In making the stipulation, the parties do not waive any legal objection to the relevancy, materiality, or the admissibility in evidence of any of the facts set forth in the stipulation, and each party reserves the right to offer any legal objection thereto, or to any paragraph, or any part hereof, either by filing written objections or by stating such objections orally in open court, at any time during the trial of said cause before the objecting party concludes his offer of evidence and rests his case. Any objection so made shall be considered timely;

1. On or about October 19, 1971 Popular Science Publishing Company, Inc. ("Plaintiff") paid to Defendant under protest the sum of twenty-five thousand

eight hundred seventy-five dollars and twenty-eight cents ($25,875.28), the amount of sales and use tax, interest and penalty allegedly due on sales of books by Plaintiff during 1965 to its book club members in California.

2. Plaintiff was in 1965 and still is a corporation organized under the laws of the State of New York and maintains its principal place of business in New York. During 1965 Plaintiff was engaged primarily in the business of publishing and distributing through the United States and foreign mails and through news vendors the monthly magazines "Popular Science" and "Outdoor Life."

3. Plaintiff also sponsored during 1965 the Popular Science Book Club and the Outdoor Life Book Club, the memberships of which to a significant extent were composed of readers of "Popular Science" and "Outdoor Life." The book clubs offered members, on a monthly basis, a choice of hard and soft cover books dealing generally with subjects similar to those treated in Plaintiff's two magazines.

4. In addition, during 1965 Plaintiff produced and sold instructional film strips and other audo-visual educational aids which dealt with subjects appropriate to secondary school curricula ("instructional materials") exclusively through A-V Division ("A-V"). A-V was set up in 1965 to market instructional materials. A-V became a separate corporation on January 1, 1966.

5. During 1965, A-V's instructional materials were sold to customers, primarily secondary schools, on the basis of orders received at Plaintiff's New York office and fulfilled from its inventories located outside the State of California. Commencing on April 16, 1975, A-V employed two salesmen in California whose duties

and activities were always confined to the sales of A-V instructional materials only. The A-V salesmen lived in and traveled throughout California contacting prospective customers which were in the main schools and other educational institutions. Such customers of A-V instructional materials had no relationships of any kind with either of Plaintiff's book clubs, although some may have been subscribers to either or both of Plaintiff's magazines. The A-V salesmen did not promote or make any customer contacts on behalf of the magazines or either book club, were in no way involved in processing orders of or collecting from the magazine subscribers or book club members, and had no operational connection of any kind which in any way related to the Plaintiff's magazines or book clubs. The A-V salesmen's employment related exclusively to the sale of A-V instructional materials.

6. California subscriptions to "Popular Science" and "Outdoor Life" were generated either through the subscriber's own initiative or as a result of mail or media advertising emanating from Plaintiff's New York office, while newsstand sales were made by independent retail vendors supplied by a New York distributor which purchased the magazines from Plaintiff at wholesale. Book club memberships were solicited exclusively through the mail from New York, and book sales were made on the basis of orders sent by mail to Plaintiff in New York in response to periodic mailings of brochures to members describing the current selections available.

7. All "Popular Science" and "Outdoor Life" subscription and book orders were received and accepted by mail at Plaintiff's New York office and filled by mail directly to the subscriber or member from Plain-

tiff's printers located outside the State of California. Plaintiff maintained no office in California through which any aspect of its magazine publishing or book club business was conducted, and Plaintiff had no employee or independent contractor in California in 1965 on a permanent or temporary basis who promoted, or in any manner was connected with or assisted, in the sales to California residents of "Popular Science" or "Outdoor Life" or any offering of either book club.

DATED: August 27, 1974

JAMES W. WALLACE and
PAUL E. EGAN
/s/ By James W. Wallace
/s/ By Paul E. Egan
Attorneys for Plaintiff
EVELLE J. YOUNGER, Attorney General
MARK W. JORDAN, Deputy Attorney General
/s/ By Mark W. Jordan
Attorney for Defendant